

# HUMAN RIGHTS DON'T STOP AT THE BORDER: WHY TEXAS SHOULD PROVIDE PREVENTATIVE HEALTH CARE FOR UNDOCUMENTED IMMIGRANTS

ALEXANDER VIVERO NEILL†

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† St. Mary's University School of Law, Candidate for J.D., May 2003; Austin College, B.A. Political Science, May 2000. The author would like to dedicate this comment to the memory of Linda Ann Hernandez, whose life is a constant source of inspiration. The author would like to thank his parents, Robert and Rosemary Neill, his family and friends, the staff and editors of THE SCHOLAR, and Laura Calvillo for their contributions.

## I. INTRODUCTION

I was born and raised in El Paso, Texas, a real border town. That experience has provided me with a different perspective on issues involving immigration, especially those dealing with illegal immigration. Policies dealing with illegal immigration have become more prominent during the last decade. One of the more recent policies to receive attention is the provision of public services to illegal immigrants.<sup>1</sup> Recent attempts by several states to expand public services to illegal immigrants have met with stiff opposition by those who disagree with "rewarding people" who are here in violation of the law.<sup>2</sup> This issue is nothing new to border towns like El Paso that deal with the provision of public benefits to illegal immigrants on a daily basis.<sup>3</sup> This is especially true regarding the provision of non-emergency care to illegal immigrants.<sup>4</sup>

The most recent development in this debate surrounds an advisory opinion issued by Texas Attorney General John Cornyn.<sup>5</sup> Under Texas law, the Attorney General is required to issue an opinion on questions of public interest and official duties when asked by a proper authority.<sup>6</sup> In this opinion, written at the request of the Harris County Attorney, Mr. Cornyn states that hospital districts in Texas must inquire into the citizenship of persons seeking preventative care at a discounted rate.<sup>7</sup> The opinion is based on the interpretation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA).<sup>8</sup>

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1. See Op. Tex. Att'y Gen. No. JC-0394 (2001). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 prohibits hospital districts within the state of Texas from providing free or discounted non-emergency health care to undocumented aliens. See *id.*

2. Jim Yardley, *Immigrants' Medical Care Is Focus of Texas Dispute*, N.Y. TIMES, Aug. 12, 2001, at A18.

3. See KENNETH F. JOHNSON & MILES W. WILLIAMS, *ILLEGAL ALIENS IN THE WESTERN HEMISPHERE: POLITICAL AND ECONOMIC FACTORS* 102-03 (1981) (asserting that border cities feel the presence of illegal aliens more acutely than other cities); Sana Loue, *Access to Health Care and the Undocumented*, 13 J. LEG. MED. 271, 274 (1992) (noting that the City of El Paso billed the federal government ten million dollars for medical care provided to undocumented immigrants).

4. See Yardley, *supra* note 2 ("For years, public hospitals and clinics in Houston, Dallas, San Antonio, El Paso and other Texas cities have offered preventive medical care to illegal immigrants.").

5. Op. Tex. Att'y Gen. No. JC-0394 (2001).

6. TEX. GOV'T CODE ANN. § 402.042 (Vernon 1998) (outlining the statutory authority of the Attorney General to issue an advisory opinion).

7. See Op. Tex. Att'y Gen. No. JC-0394, at 2 (2001) (noting that in determining whether a person qualifies for non-emergency or preventative care, a hospital district must consider the person's immigration status).

8. 8 U.S.C. § 1621 (1996); see Op. Tex. Att'y Gen. No. JC-0394 (2001). The first section of the Personal Opportunity and Work Reconciliation Act of 1996 states that unquali-

Generally, the PRA states that "illegal" aliens are not eligible for State and local benefits absent an "affirmative" State law to the contrary.<sup>9</sup> Mr. Cornyn's opinion states that the Texas legislature has enacted no such "affirmative" law. Therefore, hospital districts in Texas are not allowed to provide free or discounted non-emergency care to illegal immigrants.<sup>10</sup> The opinion goes on to state that there could be legal consequences or federal funding sanctions imposed for continuing to provide such services to non-citizens.<sup>11</sup> Among the legal consequences mentioned in the opinion are the forfeiture of federal funding and sanctions for the hospital districts that make an "unauthorized expenditure of public funds."<sup>12</sup> The opinion has drawn sharp criticism from hospital administrators across the state for being both a "misinterpretation of the law and bad public health policy."<sup>13</sup>

Although the precise number of illegal aliens currently residing in Texas is difficult to ascertain, a recent estimate places the number anywhere between 700,000 and 1.5 million.<sup>14</sup> The advisory opinion has created a practical problem for administrators who are now faced with the decision to turn away vast numbers of patients because of their immigration status or face possible sanctions under state and federal law.<sup>15</sup> In

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fied aliens are ineligible for State and local benefits. 8 U.S.C. § 1621(a) (1996). A later section allows a State to provide for the eligibility of illegal aliens for State and local benefits. 8 U.S.C. § 1621(c)(2)(B) (1996). This provision can be accomplished only through a state law passed after the enactment of the provision that "affirmatively provides for such eligibility." 8 U.S.C. § 1621(d) (1996).

9. See 8 U.S.C. § 1621(d).

10. See Op. Tex. Att'y Gen. No. JC-0394, at 1 (2001) (stating that the "PRWORA [Personal Responsibility and Work Reconciliation Act of 1996] prohibits the [Harris County Hospital] [D]istrict from providing free or discounted nonemergency (sic) health care to undocumented aliens," regardless if they meet the residency requirement for such care under the Indigent Health Care and Treatment Act).

11. See *id.* Although the Personal Responsibility and Work Reconciliation Act does not specifically mention enforcement procedures, the Attorney General discusses several consequences under both state and federal law. See *id.* These consequences include forfeiture of federal Medicare and Medicaid funds as well as personal criminal liability of the board members and administrators of the Harris County Hospital District for misappropriating public funds. *Id.* at 5. The opinion also states that the board could be "subject to a taxpayer's suit to enjoin future unauthorized expenditures." *Id.*

12. See *id.* at 5.

13. See Yardley, *supra* note 2. "The National Association of Public Hospitals and Health Systems contended that Texas enacted a law in 1999 that met federal requirements for continuing care." *Id.* Critics also attacked the opinion on public policy grounds by contending that it would increase the cost of emergency care. See *id.*

14. See *id.*

15. See Pam Easton, *Tour Outlines Need for Immigrant Preventative Care*, SAN ANTONIO EXPRESS-NEWS, Aug. 29, 2001, at 8B (stating that public hospitals have had difficulty dealing with the implications of the Attorney General's opinion).

fact, hospital administrators in Harris County, which includes the city of Houston, are already facing a criminal investigation launched by the district attorney to determine whether public funds have been misapplied by the provision of preventative health care to undocumented immigrants.<sup>16</sup>

The timing of the opinion also leaves the administrators without an immediate legislative remedy. As provided in the state constitution, the next legislative session will not convene until 2003,<sup>17</sup> and Governor Rick Perry has declined to call a special session of the legislature to resolve this issue.<sup>18</sup> Without the possibility of a timely legislative review and decision, hospitals as well as undocumented aliens in Texas face a difficult and uncertain two years.

The purpose of this comment is to educate and inform readers about the issue of providing nonemergency care for illegal immigrants. In order to accomplish this goal, this comment will provide a historical background of the various factors that have led to the rise of undocumented immigration into the United States and Texas specifically. The comment will present both moral and economic arguments in favor of providing preventative health care to this vulnerable class of persons. Finally, this comment will propose affirmative legislation that would ensure undocumented aliens access to essential preventative care.

Although, due to the current unavailability of the legislature, legislation does not present an immediate solution to the problem facing hospital administrators and undocumented immigrants, it is the only remedy that offers a potential uniform result. Leaving the solution to Texas courts may lead to inconsistent rulings that will only serve to further complicate the issue. In addition, given the public policy implications of this question, it is one best left to the legislature. Understanding the need for legislative leadership on this issue, the United States Congress provided an exception in the PRA that allows state legislatures to make the final decision as to the provision of preventative care to undocumented immigrants.<sup>19</sup>

The legislation proposed by this comment will focus on this affirmative state law provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Recognizing that the art of politics is compromise, the proposed law will balance the need to provide illegal immi-

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16. See Yardley, *supra* note 2.

17. TEXAS CONST. art III § 5(a). "The state legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor." *Id.* The last legislative session ended in May 2001.

18. See Yardley, *supra* note 2.

19. See 8 U.S.C. § 1621(d) (1996) (providing that a State may provide services to aliens who are not lawfully present in the United States through the enactment of a law affirmatively providing for such care).

grants with preventative health care against the concerns of those opposed. The goal of the proposed law will be to provide exceptions that will allow illegal immigrants to receive essential treatment such as prenatal care and treatment of, and screening for, chronic and debilitating diseases.

## II. HISTORICAL ROOTS OF UNDOCUMENTED IMMIGRATION

In order to effectively communicate the significance of the Attorney General's opinion, it is necessary to provide a background that places the issue in its proper context. A historical perspective is an essential key to understanding the depth of the problem facing undocumented immigrants and hospital administrators in Texas.

Historically, undocumented immigrants have been attracted to Texas because of job opportunities. Thus, history debunks the popular perception that undocumented immigrants come here merely to enjoy public benefits, such as preventative health care. Because this perception is the cornerstone of many arguments supporting the denial of public benefits to undocumented immigrants, an understanding of the historical motivation of immigration from Mexico into Texas reveals a fundamental weakness in those arguments.

In addition, the history of undocumented entry into Texas also underscores the need for a legislative solution in Texas. The denial of preventative health care will not dissuade undocumented entry because, as history demonstrates, the motivating factor is work. As such, hospitals in Texas will continue to see undocumented immigrants in need of free or discounted preventative care. Given this reality, those hospitals will continue to face the difficult decision of whether or not to provide preventative care to undocumented immigrants. A legislative remedy that allows state hospitals to provide preventative care is the only effective means to deal with a problem that will continue so long as job opportunities are available to undocumented immigrants.

My family is a testament to the history of immigration into Texas from Mexico. My great-grandparents undertook this journey in the early 1920s in order to escape political and economic turmoil in Mexico. I have listened to my great-grandmother, who is 103 years old, tell the story of how her family fled Mexico for a chance at a better life in the United States.

Three generations later, my family is still here and still contributing to this country. Hearing these stories and growing up in a border city has provided me with a unique perspective on the issue of immigration. It is easy for me to see the relationship between the United States and Mexico: I am a product of that relationship. Living in El Paso, I have seen many other products of the relationship between Mexico and the United States, both good and bad. I understand that this relationship is more

difficult to understand for people who have not experienced it firsthand. It is a complex issue, one that requires a more in-depth analysis into the nature of the interdependency between the United States and Mexico.

A. *Illegal Immigration: Supply and Demand*

Give me your tired, your poor  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore,  
Send these, the homeless, tempest-tossed to me,  
I lift my lamp beside the golden door!<sup>20</sup>

These verses, written by Emma Lazarus, are inscribed upon the Statue of Liberty.<sup>21</sup> The quote has long stood for the premise that the United States is a beacon of opportunity for those seeking a better life.<sup>22</sup> The phrase and the landmark itself conjure up romantic notions of turn of the century immigrants seeking to enter the "land of opportunity." Almost two hundred years later, these romantic notions have been replaced by images of immigrants crossing the border in stealth, avoiding numerous Border Patrol agents and checkpoints in order to take advantage of our generous provision of public benefits.<sup>23</sup> Although our internal perception of immigrants has changed, the external perception of America as the "land of opportunity" has not. Thus, America continues to receive large numbers of immigrants, both legal and illegal, every year.<sup>24</sup> Although the

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20. Emma Lazarus, *The New Colossus* (1883) in *THE OXFORD DICTIONARY OF QUOTATIONS* 413 (Anglea Partington, ed., 4th ed. 1992); see Halle I. Butler, Note, *Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 OHIO ST. L.J. 1473 (1997).

21. *Id.*

22. See Charles J. Ogletree Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason* 41 B.C. L. REV. 755 (2000) (noting *The New Colossus* conveys a "picture of America generously receiving the world's displaced"); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 773 (1996) (stating *The New Colossus* symbolizes America as welcoming immigrants who come seeking a better life).

23. See THOMAS J. ESPENSHADE & MARYANN BELANGER, *U.S. Public Perceptions and Reactions to Mexican Migration*, in *AT THE CROSSROADS: MEXICO AND U.S. IMMIGRATION POLICY* 227, 228 (Frank D. Bean et al. eds., 1997) (citing a poll in which two thirds of Americans believed that most recent immigrants had entered the country illegally).

24. See OFFICE OF POLICY AND PLANNING, U.S. DEP'T OF JUSTICE, *LEGAL IMMIGRATION FISCAL YEAR 2000*, at 2 (2002) (noting an increase of over 200,000 legal immigrants during the 2000 fiscal year); IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, *ILLEGAL ALIEN RESIDENT POPULATION 1* (October 1996), available at <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/illegal.pdf>> (last updated Dec. 2001) (last visited Feb. 25, 2002) (stating that the illegal immigration population increases by an estimated 275,000 every year).

immigrant population arrives here from many different countries, Mexico's proximity to the United States makes it a primary contributor of both legal and illegal immigrants.<sup>25</sup> Another important factor in understanding the relationship between the United States and Mexico is the economic disparity between the two countries.<sup>26</sup> The various effects of this complex relationship are especially prominent in the State of Texas.

### B. *Undocumented Immigration and Texas*

Mexican immigration into Texas has been a fact of life since Texas joined the United States in 1845.<sup>27</sup> Ironically, when Texas was a part of Mexico, the entry of United States citizens posed a problem for the Mexican government.<sup>28</sup> In other words, movement back and forth across the American – Mexican border is nothing new, and has continued despite the geo-political variances of the border and immigration policies of the countries on either side.<sup>29</sup> Economic and political instability within Mexico has played a role in Mexican migration to Texas.<sup>30</sup> For example, the revolution in 1910 forced my great-grandparents to flee into Texas.<sup>31</sup> However, the single largest driving force is one of mutual attraction: on one hand, the need for a labor force to meet the agricultural and indus-

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25. See Pastora San Juan Cafferty et al., *THE DILEMMA OF AMERICAN IMMIGRATION: BEYOND THE GOLDEN DOOR* 92 (1983) ("[I]llegal immigration into the United States is attractive and feasible. For Mexicans, the U.S. alternative is especially attractive because of its proximity, the relative ease of entry (land border rather than water border and relatively little guarded), and because many Mexicans have relatives with experience in the United States.").

26. See Michael C. LeMay, *U.S. Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY* 8 (Michael C. LeMay ed., 1989) ("The border between the United States and Mexico is one of extraordinary contrast – exceeded in its starkness only by the Berlin Wall. On one side of a border stretching 1,936 miles is the world's greatest economic superpower. On the other side is a Third World Country of widespread poverty and an enormous national debt.").

27. See generally TEXAS ADVISORY COMMITTEE TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *SIN PAPELES: THE UNDOCUMENTED IN TEXAS* 4-7 (1980) (discussing the history of Mexican immigration into Texas since 1845).

28. See *id.* at 2 (noting that the increasing Anglo-American presence in Texas concerned the Mexican government enough to pass laws restricting the number of new immigrants).

29. See *id.* at 5.

30. See *id.* (asserting that the influx of Mexican immigrants after the Mexican Revolution of 1910 was based primarily upon political reasons while other influxes were the result of economic reasons).

31. See *id.* (stating that the Mexican Revolution in 1910 "caused many Mexicans from the interior of Mexico to move to the northern border" where many "simply crossed the border and settled in the United States").

trial needs of Texas and other southwestern states, and the economic plight of Mexican citizens on the other.<sup>32</sup>

American political and economic policy has also contributed to Mexican immigration.<sup>33</sup> In response to a labor shortage in the Southwest during the early 1940s, Congress implemented the Bracero program.<sup>34</sup> The program allowed United States farm owners to contract Mexican citizens for seasonal agricultural work.<sup>35</sup> Until the program was terminated in 1964, it supplied more than 200,000 seasonal workers from Mexico per year.<sup>36</sup> The federal government actively promoted the hiring of migrant workers from Mexico while simultaneously attempting to restrict the quotas of immigrants entering the United States through the passage of the Walter-McCarran Act.<sup>37</sup> The Walter-McCarran Act contained a provision that allowed employers in Texas to hire undocumented agricultural workers from Mexico.<sup>38</sup> The contradiction in the act itself led to limited enforcement against illegal entry by Mexican workers.<sup>39</sup> Although the Bracero program was terminated in 1965, it "did more than anything else to activate the magnet that attracted contemporary illegal Mexican migration into the United States."<sup>40</sup>

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32. See Rodolfo O. De La Garza, *Mexican Americans, Mexican Immigrants, and Immigration Reform*, in CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION 95 (Nathan Glazer ed., 1985) (stating that agriculture and mining industries in the Southwest were dependant on undocumented workers).

33. See EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 3 (1986) (noting that several scholars have argued that United States immigration policy has encouraged illegal immigration).

34. See COMMISSION FOR THE STUDY OF INTERNATIONAL MIGRATION AND COOPERATIVE ECONOMIC DEVELOPMENT, UNAUTHORIZED MIGRATION: AN ECONOMIC DEVELOPMENT RESPONSE 15 (1990) (noting that the Bracero program was designed to combat labor shortages in the United States that resulted from the outbreak of World War II); see also Gregory C. Shaffer, Note, *An Alternative to Unilateral Immigration Controls: Toward Coordinated U.S.-Mexico Binational Approach*, 41 STAN. L. REV. 187, 190-91 (1998) (stating that the Bracero Program was designed to combat labor shortages in the United States and provided five million workers during its existence).

35. See Bryan R. Roberts & Agustin Escobar Latapi, *Mexican Social and Economic Policy and Emigration*, in AT THE CROSSROADS: MEXICO AND U.S. IMMIGRATION POLICY 49 (Frank D. Bean et al. eds., 1997).

36. See *id.*

37. See Peter H. Smith, *NAFTA and Mexican Migration*, in AT THE CROSSROADS: MEXICO AND U.S. IMMIGRATION POLICY 267 (Frank D. Bean et al. eds., 1997).

38. See *id.*

39. See *id.* ("Walter-McCarran made it illegal to be an undocumented alien but not to hire one. As a result, the enforcement against illegal entry by Mexican agricultural workers was frequently lax.").

40. JOHNSON & WILLIAMS, *supra* note 3, at 102; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, AN IMMIGRANT NATION: UNITED STATES REGULATION OF IMMIGRATION 1798-1991, at 23 (1991) (noting that the discontinuation of the Bracero program was a factor in the increase of illegal immigration); see HELENE HAYES, U.S.



The magnet that attracts illegal Mexican migration to the United States is the lure of economic opportunity. Immigration from Mexico into Texas has its roots in the economic disparity between the United States and Mexico.<sup>41</sup> This disparity stems primarily from the difference in wages paid to workers in the two countries.<sup>42</sup> This provides a large incentive for Mexican nationals to immigrate to the United States. Despite immigration laws that prohibit "unsanctioned entry into the United States," the opportunity for higher wages has led to a substantial number of illegal aliens residing in the United States.<sup>43</sup> Because Texas shares a large border with Mexico, it has a large percentage of illegal immigrants.<sup>44</sup> While estimates vary, it is estimated that between 700,000 and 1.5 million illegal immigrants currently reside in Texas out of a total population of 20,851,820.<sup>45</sup>

This large number of illegal immigrants provides employers in Texas with a large pool of workers who are willing to perform unskilled labor at relatively low wages.<sup>46</sup> At the same time, the economic instability in

IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FUTURE LIVES 30 (2001) ("[L]abor flows once authorized under the bracero program became illegal immigration after the program ended and continue today at much increased levels").

41. See Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990's*, 30 CASE W. RES. J. INT'L L. 58, 72 (1998) (stating the effect of the economic differences between the United States and Mexico regarding the flow of immigration).

42. See Katherine L. O'Connor, *An Overview of Illegal Immigration Along the United States - Mexican Border*, 4 D.C.L. J. INT'L L. & PRAC. 585, 598 (1995) (stating that the largest "pull" factor for undocumented immigrants is "the endless supply of jobs in the United States at higher wages than those which immigrants are accustomed"); Kostas A. Poulakidas, Note, *Welfare Reform and Immigration: Attempting to Find a Domestic Answer to a Global Question*, 6 IND. J. GLOBAL LEG. STUD. 283, 287 (1998).

43. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

44. See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, *supra* note 24, at 4 (noting that Texas has the second highest population of illegal immigrants in the United States); see also John P. Collins, Jr., *Developments in Policy: Welfare Reform*, 16 YALE L. & POL'Y REV. 221, 228 (1997) (stating that seventy five percent of the United States' immigrant population reside in Texas, New York, Florida and California).

45. See Yardley, *supra* note 2 (stating that the current estimate is 700,000 illegal aliens reside in Texas); Texas: *Suit Filed Over Care for Undocumented Immigrants*, AMERICAN HEALTH LINE, Aug. 22, 2001 (quoting from a National Public Radio report that listed the estimated number of illegal immigrants in Texas as 1.5 million); U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: TEXAS (Nov. 8, 2001), available at <[http://factfinder.census.gov/bf1\\_lang=en\\_vt\\_name=DEC\\_2000\\_SF1\\_U\\_DP1\\_geo\\_id=04000US48.html](http://factfinder.census.gov/bf1_lang=en_vt_name=DEC_2000_SF1_U_DP1_geo_id=04000US48.html)> (listing the total population of Texas).

46. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1159 (1993) ("Business (particularly agricultural) interests, in pursuit of a ready labor supply, sometimes might side with noncitizens [on issues of enforcement of immigration law]"); Catherine L. Merino, Note, *Compromising Immigration Reform: The Creation of a Vulnerable*

Mexico creates a steady supply of these workers.<sup>47</sup> Workers, seeing a better opportunity to provide for their families in Mexico, come to Texas and are gladly employed by companies who need cheap, unskilled labor.<sup>48</sup> Thus, the relationship is primarily one of supply and demand. So long as the demand for unskilled labor exists in Texas and the Mexican economy continues to struggle, Mexicans will find a way across the border, and Texas employers will continue to offer employment.<sup>49</sup> The fact that between 700,000 and 1.5 million illegal immigrants are currently residing in Texas despite increased vigilance on the border by the Immigration and Naturalization Service proves the old adage: "Where there is a will, there is a way." As stated by one illegal immigrant who was picked up three times by the Border Patrol in El Paso before successfully reaching his job in New Mexico: "Getting stopped is no big deal. You take the bus back, hang around Juarez near the railroad yard, talk to people, and find out about a better spot to cross."<sup>50</sup>

So long as the Mexican economy continues to struggle, Texas faces the reality of immigrants continuing to cross its borders in order to have an opportunity to dig their families out of the cycle of poverty at home.<sup>51</sup> Based on the reality of this supply and demand system, the question changes from how do we keep them out, to what duty do we owe them while they are residing in the United States? The answer to this question is complex and involves an analysis of Supreme Court decisions and federal and state legislative policies.

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*Subclass*, 98 YALE L.J. 409, 416 (1998) (stating that employers prefer to hire undocumented aliens due to their lower cost in comparison to legal employees); Poulakidas, *supra* note 42, at 290 (noting the relationship between the number of Mexican immigrants in the U.S. labor market and the demand for Mexican labor by U.S. employers).

47. See Neil A. Friedman, Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1718 (1986) ("Decisions to migrate result from highly coercive political, social and economic factors . . . . Undocumented workers are better characterized as economic refugees, rather than opportunists.").

48. See Merino, *supra* note 46, at 416 (stating that employers prefer to hire undocumented immigrants because they are willing to accept lower wages and are less likely to demand employment rights).

49. See Poulakidas, *supra* note 42, at 291 (citing the relationship between the economic growth of the United States and the instability of the Mexican economy in regard to immigration flows); *Forging a New U.S.-Mexico Migration Relationship: Recommendations from Outside the Beltway* (Border Information and Outreach Service, Albuquerque, N.M.), Sept. 2001, at 1 (noting that reforms to United States immigration laws have not stopped illegal immigration).

50. HARWOOD, *supra* note 33, at 52.

51. Shaffer, *supra* note 34, at 189 ("[T]he economic disparity between Mexico and the United States creates the incentive for unemployed and underemployed Mexicans to migrate in search of improved economic opportunities.").

### III. RIGHTS OF ILLEGAL ALIENS

Despite the fact that their presence in the United States is considered against the law, illegal aliens do receive protection under the United States Constitution.<sup>52</sup> The rights of illegal aliens flow from the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.<sup>53</sup> However, illegal aliens do not receive the same amount of constitutional protection afforded to citizens.<sup>54</sup> The exact amount of constitutional protection given to illegal aliens has varied. The current trend in the interpretation of these rights reflects the negative public perception of illegal immigrants.<sup>55</sup> This negative perception of illegal aliens has led to a steady decrease in their rights.<sup>56</sup> This section examines this trend so as to trace the roots of the current crisis facing Texas hospitals.

In 1971, the United States Supreme Court issued a landmark decision regarding the rights of illegal immigrants. *Graham v. Richardson*<sup>57</sup> involved Pennsylvania and Arizona laws that conditioned the receipt of welfare benefits on the possession of United States citizenship or residence in the United States for a specific number of years.<sup>58</sup> The court reasoned that because the law made classifications based on alienage and national origin, they were "inherently suspect and subject to close judicial

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52. See generally *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (invalidating a Texas law prohibiting children of illegal aliens from receiving public education); *Mathews v. Diaz*, 426 U.S. 67 (1976) (stating illegal aliens are persons receiving protection under the Fifth Amendment); *Graham v. Richardson*, 403 U.S. 365 (1971) (stating that citizenship and residence requirements for receipt of welfare funds violated the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Equal Protection Clause applicable to aliens). These cases reflect that illegal aliens receive protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

53. See generally *Plyler*, 457 U.S. at 215 (discussing the Due Process Clauses of the Fifth and Fourteenth Amendments); *Mathews*, 426 U.S. at 67 (noting how all persons are protected under the Due Process Clauses of the Fifth and Fourteenth Amendments); *Graham*, 403 U.S. at 365 (discussing Due Process Clause of the Fourteenth Amendment).

54. See *Plyler*, 457 U.S. at 225-26 (stating that illegal immigrants do not have the same rights as citizens).

55. See Brendan Maturem, Comment, *U.S. and Them: Cutting Federal Benefits to Legal Immigrants*, 48 WASH. U. J. URB. & CONTEMP. L. 319, 331 (1995) (stating the relationship between anti-immigrant sentiment and proposed legislation by Congress that would limit access to public benefits).

56. See Kimberly A. Johns & Christos Varkoutas, *The Tuberculosis Crisis: The Deadly Consequence of Immigration Policies and Welfare Reform*, 15 J. CONTEMP. H. L. & POL'Y 101, 122 (1998) (stating the correlation between attempts to restrict the benefits undocumented aliens can receive and the desire to remove incentive of public benefits).

57. See *Graham*, 403 U.S. at 365.

58. See *id.*

scrutiny.”<sup>59</sup> Applying this strict scrutiny standard, the court struck down the state laws as violating the Equal Protection Clause of the Fourteenth Amendment.<sup>60</sup> The court also stated that the state laws were in conflict with powers delegated solely to the federal government.<sup>61</sup> The significance of the *Graham* decision is the recognition that illegal immigrants are protected by the Constitution. However, the extent of this protection remained largely undefined.<sup>62</sup>

The next major Supreme Court case dealing with the rights of illegal aliens occurred in 1976. In *Matthews v. Diaz*,<sup>63</sup> the Court considered the constitutionality of a federal Medicare law that denied benefits to aliens unless they had been admitted for permanent residence and had resided in the United States for five years.<sup>64</sup> Because this case dealt with a federal law, the Court based its decision upon the equal protection component of the Due Process Clause in the Fifth Amendment.<sup>65</sup> The Court recognized that the protection given by the Fifth Amendment “extended to those whose presence in this country is unlawful, involuntary or transitory.”<sup>66</sup> However, the Court upheld the requirements of the Medicare law, reasoning that Congress has broad constitutional powers over naturalization and immigration.<sup>67</sup> Thus, the classification requirements provided by the federal government were a “routine and normally legitimate part of its business.”<sup>68</sup> The Court did note that states had a more limited ability to create legislation limiting the rights of aliens.<sup>69</sup> *Matthews* tells us that illegal aliens are persons within the meaning of the Fifth Amendment and that the federal government is afforded more latitude in legislating against aliens.

The next significant decision by the Supreme Court regarding the rights of illegal aliens occurred in 1982. *Plyler v. Doe*<sup>70</sup> and *In re Alien Children*

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59. *See id.*

60. *See id.*

61. *See id.*

62. *See* Marisa Ann Tostado, Comment, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033, 1043-44 (1988) (noting that the amount of protection afforded to aliens under *Graham* was unclear because the Court did not specify whether the decision was based on equal protection principles or federal preemption over state immigration laws).

63. *Matthews v. Diaz*, 426 U.S. 67 (1976).

64. *See id.*

65. *See id.*

66. *See id.* at 77.

67. *See id.* at 85.

68. *Id.*

69. *Id.*

70. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

*Education Litigation*<sup>71</sup> were consolidated by the Court and resolved in the same decision. These cases involved Texas statutes that effectively prohibited undocumented aliens from accessing free public education.<sup>72</sup> In a five to four decision, the Supreme Court held that the Texas statute violated the Equal Protection Clause.<sup>73</sup> The close decision in this case, and the subsequent change of justices on the court, demonstrate that the rights of undocumented immigrants hang by a thin judicial thread.<sup>74</sup> In this instance, the Court rejected the argument that illegal aliens are not protected by the Equal Protection Clause because of their undocumented status.<sup>75</sup> The Court reasoned that despite their unlawful presence, the aliens are persons within the meaning of the Fourteenth Amendment and are thus afforded its protection.<sup>76</sup>

Justice Brennan, writing for the majority, went on to state that illegal aliens are not a suspect class requiring strict judicial scrutiny because of their decision to enter the country illegally.<sup>77</sup> Despite this reasoning, the Court held that the Texas law violated the Equal Protection Clause. The Court reasoned that children of illegal immigrants are not active participants in entering the country illegally and thus should not be punished for the decisions of their parents.<sup>78</sup> The Court also argued that an education would help to prepare these illegal alien children to become "self-reliant and self-sufficient members in society."<sup>79</sup>

In *Plyler*, the Supreme Court articulated that children of illegal aliens may not be denied free public schooling.<sup>80</sup> Out of these three prominent

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71. In re Alien Children Educ. Litig., 501 F.Supp. 544 (S.D. Tex. 1980).

72. *Id.*

73. See *Plyler*, 457 U.S. at 202.

74. See Gregory J. Ehardt, Comment, *Why California's Proposition 187 Is a Decision for the U.S. Supreme Court*, 3 TULSA J. COMP. & INT'L L. 293, 304 (1996) (noting that three Justices in the majority decision have since retired and have been replaced with conservative Justices).

75. See *Plyler*, 457 U.S. at 210.

76. *Id.*

77. See *id.* at 220-22; Robert S. Ryan, Comment, *Proposition 187: California's Stance Against Illegal Immigration*, 25 CAP. U. L. REV. 613, 630 (1996) (stating that because aliens were here in violation of immigration law they were not "persons" in terms of the Constitution and were thus afforded less protection by the Supreme Court).

78. See *Plyler*, 457 U.S. at 220; Tostado, *supra* note 62, at 1049.

79. *Plyler*, 457 U.S. at 222.

80. See *id.* at 223-24. In reaching their decision, the Court focused on the negative effect that denial of public education would have on the children of illegal immigrants. See *id.* Specifically, the Court stated

[The Texas law] imposes a lifetime of hardship upon a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic

cases dealing with the rights of illegal aliens, this very limited right is the only one specifically articulated by the Court. The cases do define illegal aliens as "persons" under the meaning of Equal Protection Clause and the Due Process Clause and therefore entitle these individuals to constitutional protection. Additionally, the Court specifically states that laws discriminating against illegal aliens will not receive strict judicial scrutiny.<sup>81</sup> Based on these decisions, the question of what rights are afforded to illegal immigrants remains open-ended. The application of a lower standard of review allows legislatures significantly more latitude in writing laws that restrict the rights of illegal aliens.

#### IV. DECLINING RIGHTS: STATE AND FEDERAL LIMITATIONS ON THE RIGHTS OF UNDOCUMENTED IMMIGRANTS AND THE EFFECT ON TEXAS

This section will examine two prominent examples of legislative restrictions on the rights of undocumented immigrants: California's Proposition 187<sup>82</sup> and the federal Personal Work Responsibility and Reconciliation Act of 1996.<sup>83</sup> These laws reflect the current trend of restricting the rights of illegal immigrants. They are also important in placing the current crisis facing public hospitals in Texas into proper perspective.

##### A. *California's Proposition 187*

In response to the negative public opinion regarding the illegal immigration problem in California, voters passed Proposition 187 in 1994.<sup>84</sup>

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possibility that will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas law], we may appropriately take into account the costs to the Nation and to the innocent children who are its victims. In light of the countervailing costs, the discrimination contained in [the Texas law] cannot be considered rational unless it furthers some substantial goal of the State.

*Id.* The Court ultimately concluded that the Texas law prohibiting the children of undocumented immigrants did not further a substantial goal of the state and was therefore unconstitutional. *See id.*

81. *See id.* at 223.

82. 1994 CAL. LEGIS. SERV. PROP. 187 (West) (codified in scattered sections of the Cal. Code) [hereinafter CAL. PROP. 187].

83. 8 U.S.C. § 1621 (1996).

84. CAL. PROP. 187; *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1300 (9th Cir. 1997). California passed Proposition 187 by a 59% to 41% margin. *Id.* The court in *Wilson* noted that

In passing Proposition 187, the People of California found and declared that they had suffered economic hardship caused by the presence of illegal aliens in the state and that they had suffered personal injury and damage by the criminal conduct of illegal aliens in the state. California thus declared their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to

The law was a sweeping restriction on the right of undocumented aliens to receive public education, health and social services.<sup>85</sup> Its passage was the result of a growing anti-immigration sentiment created by a large demographic shift caused by an increasing amount of immigrants and a statewide recession.<sup>86</sup> Proposition 187 reflected the public perception that illegal immigrants were becoming an increasing economic burden upon the State of California.<sup>87</sup> Thus, the goals of Proposition 187 were to discourage potential illegal immigrants and to force illegal aliens residing in the state to leave using the denial of public services as the means.<sup>88</sup>

After the passage of Proposition 187, a number of lawsuits were filed challenging its validity on various legal grounds.<sup>89</sup> A federal district court consolidated the lawsuits into one action.<sup>90</sup> The district court eventually held most of the provisions in Proposition 187 were invalid, because California could not regulate immigration, which is a function reserved to the federal government.<sup>91</sup> Even though Proposition 187 was defeated, it served as a call to action for those in the federal government who oppose public benefits for undocumented immigrants.<sup>92</sup>

#### B. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*<sup>93</sup>

In his official endorsement of the Proposition 187, former governor of California Pete Wilson stated: "Proposition 187 is the two by four we need to make them take notice in Washington and provoke a legal challenge to the federal mandates that keep in place the incentives to illegal

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prevent illegal aliens in the United States from receiving benefits or public services in the State of California.

*Id.* (internal alterations and quotations omitted).

85. Ryan, *supra* note 77, at 615.

86. Julia A. Martin, Comment, *Proposition 187, Tuberculosis and the Immigration Epidemic?*, 7 STAN. L. & POL'Y REV. 89, 95 (1996).

87. CAL. PROP. 187 § 1 (stating that that the people of California continue to suffer economic hardship because of illegal aliens).

88. Tostado, *supra* note 62, at 1036-37.

89. See *League of United Latin American Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418, at \*2 (C.D. Cal. Mar. 13, 1998); see also John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 760 (2000) (stating that the challenges centered on the argument that immigration policy was a federal matter thus preempting state action).

90. See *Wilson*, 1998 U.S. Dist. LEXIS 3418, at \*2.

91. See *id.* at \*45 (listing the specific provisions of Proposition 187 that were invalid).

92. See HAYES, *supra* note 40, at 128 (noting that Congress "picked up the message" sent by the passage of Proposition 187).

93. 8 U.S.C. § 1601 (1996).

entry.”<sup>94</sup> Washington did take notice by passing a series of legislative measures in 1996 restricting the ability of illegal immigrants to receive public benefits.<sup>95</sup> For purposes of this comment, the most important of these measures was the Personal Responsibility and Work Reconciliation Act (PRA) of 1996.<sup>96</sup>

The PRA was passed “pursuant to the plenary authority of the federal government over immigration matters.”<sup>97</sup> One of Congress’ main goals in passing the PRA in 1996 was to eliminate public benefits for illegal immigrants.<sup>98</sup> In a statement on the national policy concerning welfare and immigration, Congress declared that “it is a compelling government interest to remove all incentive for illegal immigration provided by the availability of public benefits.”<sup>99</sup> Congress achieved this goal when the bill was signed into law in August of 1996.<sup>100</sup> The act was estimated to save the federal government approximately \$55 billion during the first six years.<sup>101</sup>

One example of the restriction on public benefits for illegal aliens is the denial of state and local benefits to ineligible aliens.<sup>102</sup> The only exceptions provided by the statute include: emergency care, immunizations, treatment for communicable diseases, disaster relief, and any programs specified by the Attorney General.<sup>103</sup> The most significant exception to the statute deals with the ability of a State to choose whether to provide these services:

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94. See Ryan, *supra* note 77, at 623 (quoting from letter written from Governor Wilson to President Clinton).

95. See Barbara A. Arnold, *The New Leviathan: Can the Immigrant Responsibility Act of 1996 Really Transfer Federal Power over Public Benefits to State Governments?*, 21 MD. J. INT’L L. & TRADE 225, 230 (1997) (stating that Congress intended to allow states to pass restrictive measures such as Proposition 187).

96. See 8 U.S.C. § 1601.

97. *Doe v. Wilson*, 57 Cal. App. 4th 296, 299 (1997).

98. See Holly Idelson, *Conferees Prepare for Clash on Welfare Proposals*, 54 CONG. Q. WEEKLY REP. 1922, 1923 (1996) (stating reasons behind the proposed changes in eligibility of public benefits); see also *Lewis v. Thompson*, 252 F.3d 567, 580 (2d Cir. 2000) (stating that the legislative history reflects that Congress intended to deny all federally funded health care to unqualified aliens); see also Anne E. Pettit, Note, “One Manner of Law”: *The Supreme Court, Stare Decisis, and the Immigration Law Plenary Powers Doctrine*, 24 FORDHAM URB. L.J. 165, 167 (1996) (noting that one reason behind the passage of the PRA was the belief in Congress that illegal aliens enter the United States to obtain welfare benefits).

99. See *League of United Latin American Citizens v. Wilson*, 1998 U.S. Dist. LEXIS 3418, at \*10 (C. D. Ca. March 13, 1998) (quoting from 8 U.S.C. § 1601 (1997)).

100. See Collins, Jr., *supra* note 44, at 221 (stating the goals of the PRA).

101. Recent Legislation, *Welfare Reform*, 110 HARV. L. REV. 1191, 1191-92 (1997).

102. 8 U.S.C. § 1621 (1996).

103. *Id.*



A State may provide that an alien who is not lawfully present in the United States is eligible for any state or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility.<sup>104</sup>

Although specific in its definition and application, the statute fails to mention any method of enforcement.<sup>105</sup> Thus, the possible types of sanctions against the hospitals that continue to provide care to undocumented immigrants absent specific authorization from the state legislature are unclear.<sup>106</sup> Without specific enforcement and sanction provisions, Texas hospitals that decide not to follow the advisory opinion cannot be sure what type of punishment they might face. Five years after this provision was signed into law, hospital administrators and illegal immigrants in Texas would face its effects first hand.

### C. *The PRA Comes to Texas: Tex. Att'y Gen. JC-0394*

The PRA was a moot issue in Texas until the Harris County Hospital District decided to expand preventative care benefits to undocumented aliens.<sup>107</sup> The Hospital District asked Texas Attorney General John Cornyn to evaluate their policy to ensure that it was in compliance with state and federal law.<sup>108</sup> His response stunned hospital administrators across the state and left thousands of undocumented immigrants with an uncertain health care future.

In his opinion, Mr. Cornyn stated that Texas had not enacted a law affirmatively providing for the provision of public benefits for illegal immigrants.<sup>109</sup> Because Texas had not enacted such a law, the PRA prohibited the Harris County hospital district from providing non-emergency care to illegal aliens.<sup>110</sup>

Mr. Cornyn addressed two laws passed by the Texas legislature dealing with the provision of public benefits to illegal immigrants.<sup>111</sup> The first

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104. 8 U.S.C. § 1621(d) (1996).

105. Op. Tex. Att'y Gen. No. JC-0394 (2001).

106. See *id.* (stating that section 1621 does not include a provision regarding sanctions).

107. *Morning Edition: Debate in Texas Over Providing Preventative Health Care to Illegal Immigrants* (National Public Radio broadcast, Aug. 22, 2001) (transcript on file with the author).

108. See Mary Chris Jaklevic, *This Side of the Ethical Border; Hospitals Feel Duty of Keeping Immigrants Healthy Despite Federal Limits*, MODERN HEALTHCARE, Sept. 3, 2001, at 52.

109. See Op. Tex. Att'y Gen. No. JC-0394 (2001).

110. See *id.*

111. See *id.*

law discussed by Cornyn was a 1997 amendment to the Texas Family Code that allowed the Texas Department of Protective and Regulatory services to provide public funds to eligible persons regardless of their immigration status.<sup>112</sup> The second state law discussed in Cornyn's opinion was an amendment to the Indigent Health Care and Treatment Act.<sup>113</sup> The Indigent Health Care and Treatment Act allows public hospital districts to provide free or discounted health care to indigents so long as the persons are residents of that county.<sup>114</sup> The act does not require that the person be a citizen or legal alien to receive care.<sup>115</sup> The legislature amended and reenacted this provision without changing the definition of residency or making any changes regarding the immigration status of the person seeking care.<sup>116</sup>

Cornyn stated that these laws did not meet the requirements of the PRA because they did not specifically apply to the provision of non-emergency care to undocumented immigrants.<sup>117</sup> Relying on the Oxford Dictionary definition of "affirmative" as meaning "by way of assertion or express declaration," Cornyn argued that the two laws did not "expressly state the legislature's intent that undocumented aliens are eligible for certain public benefits."<sup>118</sup>

Mr. Cornyn also rejected an argument that the affirmative state law provision of the Personal Responsibility and Work Reconciliation Act violated the Tenth Amendment to the United States Constitution.<sup>119</sup> Cornyn reasoned that because the law merely encouraged but did not require a state to pass a law providing for the eligibility of illegal immigrants, the PRA was not unconstitutional.<sup>120</sup>

### D. *The Backlash*

Hospitals in Texas have been providing non-emergency care for undocumented aliens for decades.<sup>121</sup> Thus, the opinion has created a

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112. See *id.* (discussing TEX. FAM. CODE § 264.004(c)).

113. TEX. HEALTH & SAFETY CODE ANN. §§ 61.001-.008 (Vernon 2000).

114. See Op. Tex. Att'y Gen. No. JM-1021 (1989) (stating that illegal aliens are not prohibited from receiving state services because of the residency requirement).

115. TEX. HEALTH & SAFETY CODE ANN. §§ 61.001-.008 (Vernon 2000).

116. See Op. Tex. Att'y Gen. No. JC-0394 (2001).

117. See *id.*

118. See *id.*

119. See Brief of Amici Curaie Mexican American Legal Defense Fund at 8-11, Op. Tex. Att'y Gen. No. JC-0394 (2001) (arguing that section 1621 violated Texas sovereignty in violation of the Tenth Amendment to the United States Constitution).

120. See Op. Tex. Att'y Gen. No. JC-0394 (2001).

121. See Yardley, *supra* note 2 ("For years, public hospitals in Houston, Dallas, San Antonio and El Paso and other Texas cities have offered preventative care to illegal immigrants.").

firestorm of controversy.<sup>122</sup> Hospital administrators across the state, especially in the major metropolitan areas, have openly criticized the opinion.<sup>123</sup> The hospital districts in Harris, Dallas, Bexar (which includes San Antonio), and El Paso counties have all refused to follow the opinion.<sup>124</sup> However, these administrators face possible legal action by groups challenging the practice.<sup>125</sup> In Harris County, a criminal investigation has been launched in response to the opinion.<sup>126</sup> The possible legal ramifications have led some smaller counties to discontinue providing non-emergency care to persons who cannot provide proof of citizenship.<sup>127</sup> The opinion has already caused hundreds of undocumented immigrants to be turned away from state hospitals.<sup>128</sup>

The biggest problem facing both hospital administrators and undocumented aliens is uncertainty. The Attorney General Opinion is only advisory and does not have the binding force of law.<sup>129</sup> However, the opinion

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122. See generally Steve Brewer, *Opinion Supports Immigrant Care, County Attorney Says Federal Law Would Not Be Violated as a Result*, HOUSTON CHRON., Sept. 7, 2001 at 29; Easton, *supra* note 15; Jaklevic, *supra* note 109; Yardley *supra* note 2.

123. See Easton, *supra* note 15 (administrators criticize the effect of Cornyn's opinion); Jaklevic, *supra* note 109; Brenda Rodriguez, *Open Hospitals for All? Most Oppose Non-emergency Aid for Undocumented Immigrants; Survey Comes During Dispute Over Offering Care at Public Facilities*, DALLAS MORNING NEWS, Sept. 10, 2001, at 17A (noting that hospital administrators in San Antonio, Dallas and El Paso have refused to follow the opinion).

124. See Brewer, *supra* note 123; Rodriguez, *supra* note 124.

125. See Eric Berger, *Group Expands Immigrant Health Care Complaint*, HOUSTON CHRON., Aug. 5, 2001, at A45 (stating that the Young Conservatives of Texas have filed criminal complaints in Harris, Bexar, Dallas and El Paso counties).

126. See Brewer, *supra* note 123 (stating that Harris County hospital district is the subject of a criminal investigation by the district attorney).

127. See Jason Ma, *Immigrants to Lose Some Health Services: Hospital District Decides to Follow AG's Opinion*, CORPUS CHRISTI CALLER-TIMES, July 25, 2001, at B1 (stating that the Nueces County Hospital District, which includes Corpus Christi, decided to follow the attorney general's opinion for fear of breaking the law); Harvey Rice, *Cuts In Immigrant Care Questioned; Hospital Trustees Want AG to Reconsider Rules*, HOUSTON CHRON., Aug. 23, 2001, at A17 (stating that the Montgomery County Hospital District, outside of Houston, decided to cut care for approximately 420 illegal immigrants for fear of criminal prosecution).

128. See Ma, *supra* note 128 (stating that an estimated 300 undocumented aliens will be turned away from hospitals in Nueces County); Rice, *supra* note 128 (stating that medical care to an estimated 420 undocumented aliens will be terminated).

129. See *Kerbey v. Collin County*, 212 S.W.2d 494, 497 (Tex. Civ. App.—Dallas 1948, no writ) (noting that an Attorney General Opinion is "only persuasive and not in any sense an authority to be followed by the courts"); *Travis County v. Matthews* 235 S.W.2d 691, 696 (Tex. Civ. App.—Austin 1951, writ ref'd n.r.e.) (noting that an Attorney General's opinion does not have the force of law); *Royalty v. Nicholson*, 411 S.W.2d 565, 572 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.) (recognizing Attorney General's opinions are not controlling authority).

has spurred legal action against those counties that continue to provide care for undocumented aliens. The solution to this problem must come from the Texas legislature, which does not meet again until 2003. The question becomes what action should the legislature take in 2003?

#### V. REVERSING THE TREND: WHY TEXAS SHOULD PROVIDE AFFIRMATIVE CARE FOR UNDOCUMENTED ALIENS

The Attorney General's opinion has presented a unique opportunity for Texas to reverse the current trend of severely limiting the rights of undocumented aliens in the name of economic efficiency. Texas lawmakers can affirm the right to health care regardless of citizenship. In addition, a case can be made that preventative care will save taxpayers money in the long run.

##### A. *The Moral Argument: Undocumented Immigrants Are Human Beings*

We hold these truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.<sup>130</sup>

These are the words of the Founding Fathers in their Declaration of Independence from England. These are the basic principles upon which the United States of America is founded.<sup>131</sup> A corollary of these principles is that government exists to protect people's natural or human rights. Our current humanitarian relief effort in Afghanistan is an example of this belief. However, the commitment to human rights within our own borders is less apparent. The denial of preventative health care to undocumented immigrants flies in the face of our long-standing commitment to human rights.

Theories about the concept of unalienable rights are not unimportant in the debate over the provision of preventative health care for undocumented aliens. The words in the Declaration of Independence are a reflection of the predominant view of the rights of human beings.<sup>132</sup>

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130. The Declaration of Independence para. 2 (U.S. 1776).

131. See John S. W. Park, Note, *Race Discourse and Proposition 187*, 2 MICH. J. RACE & L. 175, 199 (1999). "Historically, the most prevalent view of rights, at least in the United States and Western Europe, was that a person had rights simply by virtue of being a human being." *Id.* These are the inalienable rights used by Thomas Jefferson in the Declaration of Independence and emphasized by the philosophy of modern liberalism, which had a profound influence upon the Founding Fathers. See *id.*

132. See *id.* (noting that the predominant view of human rights in the United States is that "a person had rights simply by virtue of being a human being").

Further, according to the traditional teachings of liberalism upon which our country is founded, these inalienable rights are not conditional upon citizenship.<sup>133</sup> As one doctor in a Houston hospital stated: "My Hippocratic oath doesn't say anything about what country a person is from."<sup>134</sup> Just as doctors have a moral duty to provide health care treatment for people, regardless of citizenship, the United States has a moral duty to provide at least a minimal level of care.

Accepting this moral duty to provide care necessitates an understanding that regardless of their legal status, undocumented immigrants are human beings.

A basic concern is that emotional and physical inviolability is among the most fundamental of human rights, and should be protected by the state. Whether people are wetbacks is one issue. But they are not usually hardened criminals; their illegal entry across the Mexican border is a misdemeanor committed out of desperation for work and food, two increasingly "scarce" commodities in their home country. The illegals are human beings. It may be quite fair to arrest and deport them, but it is morally wrong to create a continuously terrifying environment in which they must suffer emotionally, and ultimately physically.<sup>135</sup>

Understanding that undocumented immigrants are human beings makes it easier to see that providing them basic preventative medicine and health care is not a right based on citizenship, but a right as a human being. "Immigration law is a key to whether Americans believe in the essential worth and dignity of the individual human being."<sup>136</sup> It seems inconsistent that the United States provides humanitarian relief to persons in foreign countries but not to those persons residing in our country.<sup>137</sup>

The duty to provide preventative care becomes more clear when it is seen not as a reward but as a basic necessity of life. In *Memorial Hospital v. Maricopa County*,<sup>138</sup> the Supreme Court of the United States recognized that denial of preventative health care is a denial of a basic neces-

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133. See *id.* at 200 (discussing the philosophy of modern liberalism and its concept of inalienable rights that are independent of the rights of citizenship).

134. Jaklevic, *supra* note 109.

135. JOHNSON & WILLIAMS, *supra* note 3, at 92.

136. HARRY N. ROSENFELD ET AL., REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM SHALL WE WELCOME xiii (1953).

137. See JOHNSON & WILLIAMS, *supra* note 3, at 103 ("How can a nation pledged to human rights around the world ignore the rights of foreign migrant workers within its borders?").

138. 415 U.S. 250 (1977).

sity of human life.<sup>139</sup> *Memorial Hospital* dealt with an Arizona statute that conditioned provision of free or discounted preventative care to indigents upon residency in the county for one year.<sup>140</sup> The purpose of the durational residency requirement was to "preserve the fiscal integrity of its free medical care program by discouraging the influx of indigents, particularly those entering the county for the sole purpose of obtaining the benefits of its hospital facilities."<sup>141</sup> Therefore, the purpose of the Arizona residency requirement and PRA is the same, to deny public benefits to discourage unwanted persons from migrating in order to preserve the fiscal integrity of limited public resources.<sup>142</sup> The Supreme Court struck down the one-year residency requirement because it infringed upon an indigent's constitutional right of interstate travel.<sup>143</sup> Although this case did not involve undocumented immigrants, the majority opinion emphasized the detrimental effects caused by the denial of preventative care:

To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.<sup>144</sup>

How is this denial of preventative health care any less cruel when the victim is an undocumented alien? To say the denial of this care is proper solely because undocumented immigrants are not citizens and are present in this country illegally denies their essential worth and dignity as human beings by forcing them into an "irreversible path to pain, disability and even loss of life."<sup>145</sup> Once undocumented immigrants are present in this country, we have a moral obligation to provide them with this basic necessity of human life. In addition, not only do these undocumented aliens reside in this country, they also work here.

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139. See *id.* at 259 (stating that medical care is a "basic necessity" of human life).

140. See *id.* at 252 (discussing the Arizona law which requires free care for indigents).

141. *Id.* at 263.

142. See *id.* (noting that the purpose of the Arizona statute was to "preserve the fiscal integrity of its free medical care program by discouraging the influx of indigents"); Pou-lakidas, *supra* note 42, at 294 (recognizing that Congress created the Welfare Reform Act, which includes the PRA to end welfare as an immigration magnet).

143. See *id.* at 269.

144. *Id.* at 261.

145. *Id.*

There is a longstanding employment relationship between employers in Texas and undocumented immigrants.<sup>146</sup> Employment opportunity in the form of higher wages remains the major driving force for undocumented entry into Texas.<sup>147</sup> This policy was even encouraged by the state and federal government as evidenced by the Bracero program and the Texas Proviso, which allowed the employment of undocumented immigrants.<sup>148</sup> Even though these policies were discontinued, that relationship is still alive and well.

In 1986, Congress attempted to end this employment relationship by passing the Immigration Reform and Control Act (IRCA).<sup>149</sup> IRCA made it illegal for employers in the United States to hire undocumented immigrants.<sup>150</sup> As an enforcement tool, IRCA contained a series of sanctions designed to dissuade employers from hiring undocumented workers.<sup>151</sup> Congressional intentions aside, IRCA has done little to deter undocumented entry into the United States.<sup>152</sup> One reason for IRCA's failure to eliminate the undocumented immigration problem is lack of enforcement.<sup>153</sup> During a five-year period between 1989 and 1994, statistics show the number of INS agents whose job is to inspect the seven million employers in the United States declined from 448 to 245.<sup>154</sup> Dur-

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146. See TEXAS ADVISORY COMMITTEE TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 27, at 2 (noting that Mexican people in Texas have historically been the main provider of cheap labor for industrial and agricultural interests).

147. See Thomas Muller, *Economic Effects of Immigration*, in CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION 109, 115 (Nathan A. Glazer ed., 1985) ("Low skilled undocumented workers continue to enter regardless of economic conditions because wage differentials between the United States and nations south of the border are so large, that even if immigrant workers can find jobs for only part of the year, their income will surpass earnings from year-round work in their native country, even assuming such stable work could be found.").

148. See JOHNSON & WILLIAMS, *supra* note 3, at 102 (noting that the Bracero program activated the "magnet" that attracts undocumented immigrants to the United States); Smith, *supra* note 37, at 267 (asserting that the Texas Proviso allowed employers in Texas to hire undocumented immigrants).

149. 8 U.S.C. § 1324a (1986).

150. 8 U.S.C. § 1324a(a)(1)(A) (1986) ("It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States . . . an alien knowing the alien is an unauthorized alien.").

151. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 355 (2001) (stating that Congress enacted a series of employer sanctions to deter employment of undocumented workers); Shaffer, *supra* note 34, at 194.

152. See Nessel, *supra* note 152, at 356; Merino, *supra* note 46, at 413.

153. See Nessel, *supra* note 152, at 359-61 (noting that the Immigration and Naturalization Service has failed to enforce the employer sanction provisions and have adopted new tactics that focus on targeting workers rather than employers).

154. See Smith, *supra* note 37, at 272.

ing the same period, the revenue from the fines for employing undocumented immigrants fell from \$18.5 million to \$10.9 million.<sup>155</sup> The INS has even recently stated that it has "turned a blind eye" to the workplace due to a lack of funding.<sup>156</sup> The lax enforcement of these employer sanctions alludes to our willingness to allow undocumented immigrants to work in our country.<sup>157</sup> Additionally, undocumented, uninsured immigrants often perform inherently dangerous and physically demanding jobs.<sup>158</sup> This presents another moral inconsistency: how can we deny these same undocumented immigrants with the basic need of health care when we allow them to work in our country, often in jobs that create medical problems due to their physical nature?<sup>159</sup> Or to put that question in another context, how can we take with one hand and refuse to give with the other?

A prominent argument against providing undocumented immigrants preventative health care is that such care is essentially a "reward" for undocumented entry into the United States.<sup>160</sup> However, this argument

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155. *See id.*

156. *See* Nessel, *supra* note 152, at 360.

157. *See* Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 638 (2000) ("Despite strict requirements of immigration laws, states such as Texas that rely heavily on undocumented immigrant labor often follow a 'no questions asked policy' when it comes to hiring these workers. . . . City Politicians in Dallas, Texas, have secretly opposed INS crackdowns on illegal workers because of the inevitable damage to the local economy and small businesses such crackdowns would produce.").

158. *See* Muller, *supra* note 148, at 112 (noting that many low-skilled Mexican immigrants tend to take "dead-end" jobs with harsh working conditions, such as fruit and vegetable pickers); Loue, *supra* note 3, at 275 (stating that large numbers of undocumented immigrants are farm workers and noting that an FDA study estimated that 90,000 farm workers may suffer the effects of pesticide poisoning); Nessel, *supra* note 152, at 359 (noting that the meatpacking industry, known for its grueling, low-paid work in hostile conditions, is supplied by a large immigrant workforce).

159. *See* Cynthia Webb Brooks, Comment, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 HOUS. J. INT'L L. 141, 173 (1994) ("The influx is allowed to continue because this country employs undocumented workers, frequently in jobs that the average American does not want to do. The duplicity of using the illegal alien's labor while lamenting the provision of basic health care services spotlights the moral dilemma.").

160. *See* Linda Kelley, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 217 (1998). Kelley quotes United States Congressman Bilbray, R-CA, as stating: "If you want to come to the United States, then come here legally. We will reward you and your children [with welfare benefits] if you play by the rules. We will reward you for generations to come. But we will not reward you for violating our national sovereignty, for breaking our laws, and for violating the basic concept that when you go into somebody else's neighborhood or somebody's home or into their country, you go there as a guest, not as an intruder." *Id.* *See also* Linda S. Bosniak, *Opposing*



fails to realize that employers in the United States, including Texas, actively promote violations of the law by employing undocumented workers.<sup>161</sup> Opponents of the provision of preventative care also argue that it gives an incentive to enter the country illegally.<sup>162</sup> In a 1995 report to Congress, the United States Commission on Immigration Reform stated that denial of public assistance benefits will leave undocumented immigrants with only one solution, to retreat to their country of origin.<sup>163</sup> This argument ignores the overriding reality: undocumented immigrants come to the United States to work.<sup>164</sup> Even if denied preventative care, undocumented immigrants will not simply shrug their shoulders and return home. Failure to provide this care will only leave undocumented immigrants vulnerable to "irreversible pain, disability and even loss of life" with no ability to respond.<sup>165</sup> Once undocumented immigrants enter the United States and Texas, we have a moral obligation to provide them with basic health care. As stated by United States Congressman, Sylvestre Reyes D-El Paso, the former head of the El Paso district of the Border Patrol: "[Many immigrants] pick the food, they prepare the food and they serve the food we eat, yet we have to debate whether to keep them healthy?"<sup>166</sup> The moral obligation to provide preventative health care becomes more clear because undocumented immigrants are knowingly employed by Texas business and provide goods and services that are used by Texans on a daily basis.

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*Proposition 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 562 (1996) (quoting a pro-Proposition 187 group as saying: "[I]t's time to stop rewarding illegals for successfully breaking our laws.").

161. See Brooks, *supra* note 160, at 173 (stating that the influx of illegal aliens continues because they are provided with employment in the United States).

162. See Smith, *supra* note 37, at 272 (noting that proponents of Proposition 187 argued that denial of social services such as non-emergency care would reduce illegal immigration).

163. See U.S. COMMISSION ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 117 (1995).

164. See Elizabeth Hull, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 92 (1985) (citing Justice Brennan's opinion in *Plyler v. Doe* that the dominant incentive for illegal entry into the United States is the availability of employment); Brooks, *supra* note 160, at 173 (stating that the influx of illegal aliens continues because they are provided with employment in the United States); see also *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578-79 (S.D. Tex. 1980) (recognizing that overwhelming evidence indicates that social services are unimportant in the decision to immigrate).

165. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974).

166. Jo Ann Zuniga, *Two Lawmakers Push for Health Care for Immigrants*, HOUSTON CHRON., Sept. 6, 2001, at A26.

### B. *The Economic Argument: Preventative Care Makes Sense*

The economic argument for providing basic preventative health care is persuasive because it will reduce long-term health care costs. Opponents of providing this type of care for undocumented immigrants often argue that it creates a significant drain on limited local public resources.<sup>167</sup> Providing preventative care for undocumented workers will cost money and the state of Texas does not possess unlimited resources. Providing this care, however, is less costly because it enables physicians to treat conditions before they degenerate into emergencies that necessitate more elaborate procedures and care.

The restriction on undocumented aliens' ability to receive public benefits provided in the PRA applies only to non-emergency care.<sup>168</sup> The PRA still requires public hospitals to provide emergency care for all persons regardless of citizenship.<sup>169</sup> Thus, Texas hospitals will still be required to treat undocumented aliens for emergency conditions.

The goal of preventative care is to ensure that a medical condition does not advance into a life threatening medical emergency. If undocumented aliens are denied the opportunity for preventative care and their condition degenerates into a medical emergency, a Texas hospital will be required to treat them regardless of their citizenship or ability to pay. The treatment of emergency conditions is generally far more costly than preventative care. As such, preventative care makes economic sense because it is cost effective.

Physicians from hospitals throughout the state argue that the denial of preventative health care will only increase the costs associated with the provision of health care to undocumented immigrants.<sup>170</sup> Dr. Ron Anderson, CEO of Parkland Hospital District in Dallas stated:

It's been our view that from a good public health policy perspective, we would provide preventative care so as to avoid the higher cost of

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167. See Ehardt, *supra* note 74, at 309 (stating that supporters of immigration reform view illegal immigrants as a drain on the economy and the welfare system).

168. See Op. Tex. AG. (JC-0394) (stating that the PRA applies to non-emergency care).

169. See 8 U.S.C. § 1621(b)(1) (1996). The restriction of public benefits for unqualified aliens does not apply to "assistance for health care items and services that are necessary for the treatment of an emergency medical condition." *Id.*

170. See Editorial, *Preventing Problems; State Better Off to Care for Illegal Immigrants*, DALLAS MORNING NEWS, Aug. 21, 2001, at A10. Hospital administrators insist that "the denial of preventative care ends up turning small health problems into big ones and cost taxpayers more in the long run." *Id.*

emergency care and hospitalization, which we would be forced to provide.<sup>171</sup>

Dr. Kenneth L. Mattox, chief of staff at Houston's Ben Taub Hospital stated: "They [undocumented immigrants] come into the emergency room and they are supersick and I have to put them in intensive care and the cost is four to ten times as much."<sup>172</sup>

The economic debate does not end with the efficient use of taxpayer's money. Hospital administrators also argue that the denial of preventative care will further deplete already strained emergency room resources.<sup>173</sup> Thus, if undocumented immigrants are forced to wait until their conditions necessitate complicated emergency care and hospitalization, the limited public resources available for emergency rooms will be further strained. This strain on resources affects undocumented immigrants as well as the surrounding community. As such, preventative care for undocumented immigrants promotes the efficient allocation of the already limited resources.<sup>174</sup>

The fact that the cost will be passed upon the surrounding community is a significant problem for poorer communities on the border. Given their proximity to Mexico, border communities such as El Paso deal with a disproportionate number of undocumented immigrants.<sup>175</sup> Thus, the economic burden on these communities is significant.<sup>176</sup> The denial of preventative medicine for undocumented immigrants places an even greater strain upon poorer communities, such as those along the border. In essence, Congress is penalizing these communities for its own failure to adequately enforce United States immigration policy.<sup>177</sup>

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171. *Debate in Texas Over Providing Preventative Health Care to Illegal Immigrants*, *supra* note 108.

172. Yardley, *supra* note 2.

173. See Easton, *supra* note 15 (quoting Dr. Karen Shoyer, an emergency room physician, as stating that without preventative care, "undocumented immigrants will be forced into the city's strained emergency rooms").

174. See Yardley, *supra* note 2 (quoting Dr. Ron Anderson, CEO of Parkland Hospital in Dallas as stating the preventative care for undocumented aliens is "prudent fiscal policy").

175. See O'Connor, *supra* note 42, at 589 (stating that El Paso, Texas has been one of the most affected areas by the recent increase of illegal aliens).

176. See Dave McCurdy, *The Future of U.S. Immigration Law*, 20 J. LEGIS. 3, 8 (1994) (noting that the majority of the costs of illegal immigrants are absorbed by state and local governments); Loue, *supra* note 3, at 274 (noting that in 1986, the City of El Paso billed the federal government ten million dollars for the cost of medical care provided to undocumented immigrants).

177. See DAVID M. REIMERS, *UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION* 134 (1998) (quoting former Senator Bob Dole as stating that Congress should not ask Texas, Florida, California and others to pick up the finan-

Provision of preventative health care offers economic incentives for poor communities. Costly emergency procedures are prevented by low cost, routine treatment. Hospital administrators, who are familiar with the costs associated with the care of undocumented immigrants, support this opinion. Opponents of providing this care for undocumented aliens argue that its elimination will save taxpayers vast sums of money. However, the professional opinion of hospital administrators across the state directly contradicts this argument. Any short-term economic savings provided by the denial of care increases the long-term cost as treatable medical conditions escalate into medical emergencies requiring costly procedures and longer periods of hospitalization. A fortiori, the denial of treatment could lead to a further strain on the limited resources available for emergency treatment. If opponents are concerned about the cost of providing health care for undocumented immigrants, preventative care is the solution and not the problem.

#### VI. LEGISLATIVE REMEDY: PROVIDING ESSENTIAL CARE TO UNDOCUMENTED IMMIGRANTS

The PRA and the Attorney General's opinion place Texas in a moral and economic dilemma. Fortunately, the PRA also provides Texas with a remedy to cure the situation.<sup>178</sup> The Texas legislature has an opportunity to correct the moral and economic problems caused by the PRA. The legislature, however, will face public opposition to the provision of preventative care to undocumented aliens.

A recent poll reveals that fifty-four percent of Texans believe that hospitals in the state should deny free preventative medical services to undocumented immigrants.<sup>179</sup> Recognizing this, the proposed legislation represents a compromise. This legislation will benefit both undocumented aliens and taxpaying citizens by providing care that limits costly emergency room visits, thereby conserving the limited resources available to local hospital districts. The proposed legislation recognizes the moral duty to provide medical care, which the Supreme Court recognized as a "basic necessity of life,"<sup>180</sup> to persons who reside and work within the State of Texas.

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cial burden of illegal immigration if the federal government is "not willing to protect our borders").

178. See 8 U.S.C. § 1621(d) (1996) ("A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after the date of the enactment of this Act [enacted August 22, 1996] which affirmatively provides for such eligibility.").

179. See Rodriguez, *supra* note 124.

180. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974).

### A. Prenatal Care

One of the most important types of care needed by undocumented aliens is prenatal care.<sup>181</sup> Prenatal care can be defined as "pregnancy and infant-related medical support services provided with the goal of promoting the health and well-being of the pregnant woman, the fetus, the infant, and the family up to one year after the infant's birth."<sup>182</sup> If a mother is denied this type of care, the chances that the child will be born with some type of complication increases dramatically.<sup>183</sup> Thus, providing basic prenatal care for undocumented immigrants helps to ensure that the child is born healthy.

Prenatal care makes basic moral and economic sense. As the Supreme Court recognized in *Plyler v. Doe*, it is not right to punish the child for the illegal conduct of the parent.<sup>184</sup> In addition, the Court in *Plyler* noted that the failure to educate undocumented children would promote "the creation and perpetuation of a subclass within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>185</sup> The Court reasoned that whatever costs saved by denying undocumented children a public education would be "wholly insubstantial in light of the costs involved to these children, the State and the Nation."<sup>186</sup> Failure to provide prenatal care can have a far more devastating effect on a child than denial of an education.<sup>187</sup> Providing prenatal care ensures that the children of undocumented immigrants will be healthy and productive members of society. Furthermore, if the child is born in the United States, the child automatically gains citizenship regardless of the mother's immigration status.<sup>188</sup> As such, the denial of prenatal care harms a future citizen.

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181. See Stacey M. Schwartz, Note, *Beaten Before They Are Born: Immigrants, Their Children, and a Right to Prenatal Care*, 1997 ANN. SURV. AM. L. 695, 697-98 (1997) ("Health care practitioners and policy makers widely agree that prenatal care is critically important to the health of a pregnant woman and her child.").

182. L. Rachel Eisenstein, *Prenatal Health Care: Today's Solution to the Future's Loss*, 18 FLA. ST. U. L. REV. 467, 468 (1991).

183. See Schwartz, *supra* note 183, at 698 ("Study after study has linked inadequate prenatal care to health risks such as low birth weight, premature delivery, birth defects, and HIV infection. Each of these conditions can have devastating effects on the lives of children, beginning the moment they are born.").

184. See *Plyler v. Doe*, 457 U.S. 202 (1982).

185. See *id.* at 230.

186. See *id.*

187. See Eisenstein, *supra* note 183, at 472-73 (stating that lack of prenatal care can contribute to low birth weight which can lead to mental or physical handicaps or even death).

188. 8 U.S.C. § 1401 (1996).

In addition to the moral argument, there is the fact that prenatal care is good economic policy.<sup>189</sup> Absence of prenatal care increases the chances of medical complications including an increased risk of mental or physical handicap.<sup>190</sup> Children born with a physical or mental handicap may require a lifetime of care at a high cost.<sup>191</sup> One estimate lists the cost of providing this care between \$300,000 to \$400,000 per child.<sup>192</sup> Even if the complications are minor, the local hospital district will still be required to administer care for the child. Because the child of an undocumented alien automatically becomes a citizen of the United States at birth, the child is eligible for public benefits available to citizens.<sup>193</sup> As the child will be entitled to public benefits, the cost to provide the care necessary for a critically ill, low birthweight infant will be significantly greater than providing access to prenatal care.

Prenatal care will benefit both undocumented immigrants and the local hospital districts by increasing the probability that children will be born without debilitating conditions, which require a greater amount of resources often at public expense. Providing prenatal care is a cost effective way to ensure our moral obligation to undocumented aliens while ensuring that their children, who are United States citizens at birth, are healthy members of the population.

#### B. *Screening and Treatment for Chronic and Debilitating Diseases*

The second type of care that should be considered by the Texas legislature is screening for and treatment of chronic and debilitating diseases. As the Supreme Court of the United States recognized, this type of preventative care is a "basic necessity of life to an indigent" and prevents the "danger of substantial and irrevocable deterioration" of health.<sup>194</sup> The screening for and treatment of chronic and debilitating diseases will allow local hospital districts to mitigate the effects of these conditions before expensive emergency care is needed.

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189. See Schwartz, *supra* note 182, at 703 (discussing an Institute of Medicine study that found "that every dollar spent on prenatal care can save \$3.38 in health care costs for infants born with low birthweight" and a finding by the Children's Defense Fund that the average cost of caring for a low birthweight infant in intensive care is between \$10,000 to \$15,000 whereas the average cost of prenatal care is only \$600).

190. See Eisenstein, *supra* note 183, at 473; Schwartz, *supra* note 182, at 698.

191. See Eisenstein, *supra* note 183, at 473.

192. See *id.* See also Schwartz, *supra* note 182, at 704.

193. See 8 U.S.C. § 1401 (1996) (stating that persons born in the United States become citizens at birth); Schwartz, *supra* note 182, at 730 (noting that children of undocumented immigrants are citizens upon being born in the United States and are therefore entitled to public benefits such as Medicaid).

194. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259, 261 (1974).

Withholding treatment from individuals who are suffering from chronic and debilitating diseases or conditions can lead to life threatening situations. Texas has already recognized that such treatment is important enough to allow indigent residents access to such care regardless of the ability to pay.<sup>195</sup> Hospital districts throughout Texas have routinely provided this type of care for undocumented aliens.<sup>196</sup> Recognizing these facts, the Texas legislature should provide an affirmative state law that includes this type of care for undocumented aliens.

Numerous conditions can be considered chronic and debilitating including diabetes, heart disease, cancer and asthma. Given the large number of these conditions, the legislation should be flexible in defining the care to be provided. The flexibility of the legislation will allow hospital administrators the discretion to determine whether the preventative care should be provided on a case-by-case basis. This will ensure that health care professionals can comply with their ethical duties while at the same time preventing conditions from advancing to life threatening emergencies. If preventative care is limited to specific enumerated conditions, health care administrators will face the ethical dilemma of turning away patients who do not meet the statutory requirements. In addition, strict statutory requirements would also force local hospital districts and undocumented immigrants to wait until their condition degenerated into an emergency situation that requires the increased expenditure of public resources.

Early treatment and detection of these diseases is crucial in mitigating potential life threatening situations. Provision of this care ensures our moral duty to preserve the life of undocumented aliens who live and work within our borders. As with prenatal care, this type of treatment also makes economic sense by preventing more costly emergency room visits and long term hospitalization. For example, an undocumented immigrant suffering from diabetes could receive routine treatment in the form of insulin and other types of medication. If hospital districts are forced to stop the provision of this preventative care, undocumented aliens can suffer any number of life threatening conditions that require emergency treatment. Pursuant to federal law, hospitals are required to provide emergency care, regardless of immigration status.<sup>197</sup> The cost of

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195. See TEX. HEALTH & SAFETY CODE ANN. § 61.052 (Vernon 2000) (asserting that hospital districts shall provide health care assistance to indigents).

196. See Yardley, *supra* note 2 (stating that public hospitals in Texas have routinely offered preventative health care to undocumented immigrants).

197. See 8 U.S.C. § 1621(b) (1996), *supra* note 108 (stating that emergency care must still be provided to undocumented aliens); 42 U.S.C. § 1396(b)(v)(2) (1996) (authorizing federal reimbursement to states for costs incurred as a result of providing treatment of an emergency medical condition to undocumented aliens).

treating an undocumented immigrant dramatically increases because of the more complex care and increased amount of hospitalization required to effectively treat the patient.<sup>198</sup>

If the Texas legislature is serious about saving taxpayer's money, then it should pass a law providing undocumented immigrants with preventative care. This care will also allow hospital districts to preserve already strained resources by controlling costly emergency room visits and long term hospitalization.

## VII. CONCLUSION

The experience of growing up in a border town, along with my family history, has provided me with a different prospective on undocumented immigration. I have seen the contributions of undocumented immigrants to the workforce and witnessed the poverty that drives them across the border. My own family was driven across the same border because of political and economic turmoil in Mexico. I have also seen injustices done to these same workers when they are injured while providing the American economy with inexpensive, expendable labor. Preventing these persons from obtaining treatment for illnesses is nothing more than publicly sanctioned injustice.

The Attorney General's advisory opinion eliminating preventative health care to undocumented immigrants has placed public hospitals and undocumented immigrants in Texas in a difficult position. It has also provided the Texas legislature with the opportunity to reverse the current trend of denial of basic human rights to undocumented immigrants. By providing this care, Texas acknowledges the true cost of the constant flow of undocumented immigrants into its borders. As long as Mexico remains an economically impoverished country and the United States provides employment opportunities, the flow will continue.

Arguments against providing this type of care rely primarily on a flawed economic cost-benefit analysis: illegal immigrants are draining limited resources while giving little in return.<sup>199</sup> These arguments, however, fail to consider the social cost of ignoring the basic principles of inalienable rights that our government was created to protect. These

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198. See *Debate In Texas Over Providing Preventative Health Care to Illegal Immigrants*, *supra* note 108 (quoting Anne Dunkelberg from the Center of Public Policy Priorities as stating "Both of which [diabetes and asthma] if they're not treated properly, you know, can lead to some fairly catastrophic health conditions and expensive emergency room bills and patient bills that the local governments might be able to avoid").

199. See Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 865 (1999) (noting that opponents of illegal immigration argue that it is a drain on the economy).



rights are not conditional upon citizenship. They exist for the benefit of every person, regardless of their country of birth.

The cost-benefit analysis also fails to include the substantial economic benefits of providing preventative care. Prenatal care ensures that an unborn child, and future citizen, will be born healthy and able to live a productive life. Providing simple and relatively low cost treatment for chronic and debilitating conditions can prevent expensive emergency procedures. Thus, remedial care and treatment allows local hospital districts in Texas to minimize the cost of undocumented immigration while upholding our duty to care for those residing and working within our borders.

This is a reality and responsibility that Texas must accept. The cost of providing undocumented immigrants with preventative health care will not be insignificant; however, such is the responsibility that comes with living in a country that cherishes the concept of inalienable rights and believes in the essential worth and dignity of the human being.

Texas is at a crossroads. One path ignores the complexity of our immigration problem by denying basic medical care in the hopes that undocumented aliens will return to their country of origin. Along the other path lies the more difficult solution, which requires recognition of the complexity of the immigration problem by spending public money on non-citizens. As Robert Frost once wrote, it is not easy to take the road less traveled, but once the journey is undertaken it makes all the difference.<sup>200</sup> For hospitals and undocumented immigrants in Texas, taking the road less traveled today will make all the difference tomorrow.

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200. See ROBERT FROST, *The Road Not Taken*, in *THE COMPLETE POEMS OF ROBERT FROST* 131 (1965).

